



# Department of Law Monthly Report

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## Collections & Support

### PERSONNEL NEWS

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Collections and Support welcomed two new persons to the section in March. AAG Leroy Latta transferred to the section from the Environmental Section. Leroy brings with him twelve years of experience with the department, including work in both the civil and criminal divisions. He will be handling a wide range of issues relating to child support enforcement. Linda Reagan joined the section as the new Litigation Assistant in the collections unit. She will be handling civil collections and assisting with the new restitution project. She comes to us from the Commercial Section and brings with her substantial collections experience which will serve her well in her new position. Welcome Leroy and Linda!

### VICTIM RESTITUTION COLLECTIONS UNDERWAY

The month of March saw a significant increase in the victim restitution collection caseload. During March 2002, the collections unit received 101 restitution judgments for collection, 16 of which were returned to the issuing courts due to insufficient information.

Initial notices were sent to 171 recipients in the remaining 85 cases. Demand letters were sent to 41 restitution debtors. Eight judgments were paid in full, and satisfactions of judgment were filed. Our office received 29 payments totaling \$13,025.34 toward restitution judgments in March and requested 22 disbursement checks be issued to recipients.

### **COURT RULES CSED CAN HOLD FUNDS FOR FUTURE SUPPORT**

In response to an order from Judge Mark Rindner, AAG Jeff Killip filed a brief in *Burton v. Burton*, discussing CSED's authority to hold funds for future child support and the court's authority to order CSED to hold funds for this purpose. Jeff argued that CSED has the authority to hold funds for future child support payments under AS 25.27.020(a)(4), AS 25.27.080(b), and AS 25.27.060(c), which gives the court the authority to require the obligor to submit "reasonable security" to ensure that child support payments are timely made. The brief further noted that AS 25.27.103, which requires CSED to "disburse that portion of a payment that exceeds the amount of money necessary to satisfy obligor's immediate duty of support in accordance with state and federal requirements," does not bar CSED from holding funds to ensure timely child support payments in the future. Judge Rindner agreed and ordered that funds already held by CSED for future child support payments continue to be held for this purpose.

### **Commercial**

### **DAVID BROWER JOINS THE COMMERCIAL SECTION IN JUNEAU**

In March, David Brower started his first full month as a member of the section. David will serve as an assistant attorney general, representing the Occupational Licensing

Division and the Department of Revenue. He comes to our section from the Juneau District Attorney's Office.

### **Environmental**

### **NORGETOWN SETTLEMENT**

As one of his last official duties in the environmental section, AAG Leroy Latta recovered money owed to the state for investigative and cleanup costs at a contaminated site located in Anchorage. Tetrachloroethylene (PCE) was detected in the soil and groundwater emanating from the Norgetown Laundry and Dry Cleaners during the early 1990s. AAG Latta has worked with the Department of Environmental Conservation for many years to compel the Norgetown owners to clean up and remediate the contaminated area. He successfully negotiated a settlement of the state's response cost in the case for \$150,000. Negotiations on a "Compliance Order By Consent" (COBC) are almost complete. The COBC will spell out the standards for cleanup of the site as well as formally obligate the responsible parties to pay DEC's ongoing oversight costs until the site is cleaned up to the state's satisfaction.

### **Fair Business Practices**

### **MEDICAL BOARD SUMMARILY SUSPENDS DOCTOR'S LICENSE**

On March 22, 2002, the State Medical Board adopted the hearing officer's 40-page proposed decision and determined that Dr. Steven Nathanson's license to practice medicine should remain suspended pursuant to AS 08.64.331(c), which provides that the medical board "may summarily suspend a license before final hearing . . . if the board finds that the licensee poses a clear and immediate danger to public health and safety if the

licensee continues to practice." The board originally suspended Dr. Nathanson's license on December 3, 2001, based on a Petition for Summary Suspension filed by the Division of Occupational Licensing. A hearing on the summary suspension occurred on January 6-8, 2002. A five week disciplinary hearing is scheduled to commence April 22, 2002. AAG Robert Auth is representing the Division of Occupational Licensing in all proceedings involving Dr. Nathanson.

### **CERTIFIED NURSE AIDE SURRENDERS CERTIFICATE**

On March 13, 2002, the Board of Nursing accepted the voluntary surrender of the Certified Nurse Aide (CNA) certificate of Vikki Bell, which resulted in a dismissal of the disciplinary action filed against her. Ms. Bell had been convicted in 2000 of forgery in the second degree and attempted theft in the first degree, both felonies. The accusation alleged that these convictions were substantially related to the qualifications, functions, or duties of a CNA and therefore constituted grounds for discipline under AS 08.68.334(2). AAG Robert Auth represented the Division of Occupational licensing in the disciplinary proceeding.

### **REGULATORY COMMISSION OF ALASKA CONSIDERS LOCAL PHONE RATES**

AAGs Ron Zobel and Steve DeVries represented the Public Advocacy Section (PAS) of the Regulatory Commission of Alaska in the first phase of the ACS rate case, which involves the local phone rates in 80% of Alaska. This case came to hearing before the commission in March and involved review of eight separate revenue requirements for all of the ACS service areas statewide. Before hearing, and after much discovery and negotiation, the parties (PAS, ACS and GCI) settled all but one issue - depreciation. A stipulation was presented to the commission for its review covering a number of disputed operating expenses, revenues, and rate of

return issues. The remaining disputed depreciation issue went to hearing, which lasted approximately 5 days. The hearing focused on the amount of annual depreciation to be charged in rates. The commission has taken the case under advisement. The next phase will deal with rate design, or how the approved revenue is to be collected in rates.

## **Governmental Affairs**

### **FORMER EMPLOYEE'S SUIT DISMISSED**

Judge Singleton of the United States District Court dismissed the wrongful-discharge suit of a former cook at the Spring Creek Correctional Center. The former employee – who represented himself in the suit – claimed that the state and his former supervisors had constructively discharged him by allowing inmates (who he alleged might have had contagious conditions) to work alongside him in the kitchen. Judge Singleton dismissed the claim against the state on the basis of sovereign immunity and dismissed the claims against the former supervisors because they had not been the former employee's employer.

### **EMPLOYMENT LITIGATION CAN BE EXPENSIVE EVEN WHEN THE EMPLOYING DEPARTMENT DOES IT RIGHT**

A former employee's persistence demonstrates that, even when a department goes the extra mile to make sure that it handles a discharge correctly, the litigation can prove to be time-consuming and expensive.

The state recently prepared its brief to the Ninth Circuit Court of Appeals concerning an appeal filed by a former cook at the Spring Creek Correctional Center. The Department of Corrections discharged the cook in 1998, after a psychologist concluded that the cook was not psychologically fit for duty. Before discharging the employee, however, the department sought suggestions from the psychologist about other

positions that might be suitable for accommodating the employee – even though the employee never requested accommodation and insisted, instead, that he was fit for duty. The department terminated the cook's employment only after its efforts to find a suitable alternate position proved unsuccessful.

The employee's union filed a grievance over the discharge and, after a three-day hearing, an arbitrator ruled that the state had just cause for the termination.

In the meantime, the former employee – without a lawyer – filed suit against the state and his former supervisor in state and federal courts, alleging discrimination, conspiracy, RICO violations, breach of contract, and various other claims. The state and the supervisor obtained summary judgment in state court and, later, in federal court. When the employee appealed to the Alaska Supreme Court, the state successfully defended the state-court summary judgment. The state is now defending the federal-court judgment in the Ninth Circuit.

## Human Services

### **ALASKA SUPREME COURT UPHOLDS TERMINATION OF PARENTAL RIGHTS IN TWO CASES**

*P.M. v. DFYS*, involved a parent's right to appointed counsel. Mr. M. had been unhappy with the representation provided him by court appointed attorneys. After his first attorney was allowed to withdraw, he filed a bar complaint against his second attorney, and "fired" him. The superior court, Judge Gonzalez, without allowing Mr. M. a hearing to air his grievances against the attorney, required him to choose between proceeding to trial with the appointed attorney, or representing himself. Mr. M. refused to accept

either choice, whereupon the judge dismissed the attorney, continued the case for several months to allow Mr. M. time to be released from prison and to prepare his case, and required him to proceed without benefit of a court-appointed attorney.

The supreme court held that the superior court's action did not violate Mr. M.'s statutory or constitutional due process rights to counsel, nor did Mr. M.'s allegations against his attorney rise to a level that would require the court to hold an evidentiary hearing on the issue. The court also held that it was not error for the trial court to require Mr. M. to proceed pro se, rather than requiring Mr. M. to proceed with the appointed attorney participating in some capacity. In spite of Mr. M.'s indigent status, the court awarded costs and fees for the appeal to the state, and affirmed the award on Mr. M.'s motion for reconsideration. AAG Mike Hotchkin handled the appeal for the state.

The Alaska Supreme Court this month also decided *S.H. & R.H. v. DFYS*, affirming Judge Reese's decision terminating parental rights. The court found the many years of intervention and case plans to be ample reasonable efforts to prevent the break up of the family. Although the mother had recently entered a drug treatment facility, the court found that her history of periods of progress and periods of neglect showed she had not corrected the behavior that placed her children at risk of harm and justified the termination. In addition, the court looked at the complete history of DFYS intervention and the father's consistent previous refusal to participate in case plans, and rejected the argument that special, additional efforts needed to be made after the father (by withdrawing his relinquishment of the children) demonstrated some interest in parenting the children upon his release from prison in the future. The court recognized treatment services provided in the institution by corrections to be active remedial efforts by DFYS. AAG Jan Hart DeYoung handled the appeal for the state.

## **FAIRBANKS SECTION FILES BRIEFS IN THREE APPEALS**

March was a busy month for the Fairbanks Human Services Section, particularly since the section is still short handed. The section has been busy with appellate cases and has completed briefing in the *A.J.*, *R.B.*, and *R.P.* termination appeals.

AAG Karla Taylor-Welch recently won an appeal in *R.G. v. DFYS*. The Alaska Supreme Court affirmed a termination of R.G.'s parental rights under AS 47.10.011(11) based on substantial evidence in the record supporting the superior court's finding that R.G.'s personality disorder prevents her from protecting E.G. from substantial risk of harm.

In addition, Becky Snow (who is still helping the section on a few limited matters) recently won *V.S.B. v. DFYS*, an ICWA case. The supreme court affirmed the superior court's finding that the mother, through her action and inaction, caused her children to suffer mental injury, sexual abuse, and substantial risk of physical harm.

### **Legislation/Regulations**

## **IMPORTANT REGULATIONS PROJECTS REVIEWED**

During the month of March, the Legislation and Regulations Section processed several regulations projects of importance to the state. The section reviewed numerous pages of fish and game regulations for the upcoming seasons. Additionally, the section processed regulations of the Commercial Fisheries Entry Commission on certain herring fisheries. Other topics of regulation projects completed this month include public use of state parks and recreation areas; assisted living home regulations; occupational licensing; insurance regulations; procedural matters for the Alaska

Human Resources Investment Council; workers' compensation procedures; and hearings, standards for charter schools, and teacher certification for certain education activities.

The section also reviewed and edited proposed amendments for legislation and edited bill reviews for legislation pending action by the governor.

The section is in the process of updating the Drafting Manual for Administrative Regulations.

### **Natural Resources**

## **BOARD OF FISHERIES MEETING**

AAGs Lance Nelson and Blaine Hollis attended the Board of Fisheries' Statewide Crab Meeting in Anchorage, advising the Board and Department of Fish and Game on legal issues raised by regulatory proposals.

## **BOARD OF GAME MEETING**

From March 8-18, AAG Kevin Saxby attended the Board of Game meeting in Fairbanks. One hundred seventy-four proposals for regulatory change were considered by the board, together with other business. No sitting member of the board had yet been through an Interior Region Meeting and most of the members had never dealt with many of the issues raised at the meeting, since the board is comprised of all new members. However, after a lot of late nights and some very long days, new board chairman Ben Grussendorf steered the meeting to completion.

## **PRUDHOE BAY ACCESS DISPUTE**

BP recently cancelled its contracts with tour operators who, in past years, have bussed tourists across the Prudhoe Bay oilfield to the Arctic Ocean. BP's stated reason was heightened concerns about pipeline and oilfield

security in light of the 9/11 terrorist attacks. DNR pointed out that BP's state leases required the company to allow such public access, and BP needed the state's approval to restrict or eliminate it. After much back and forth, BP agreed to let the tours continue, with additional, tighter security measures. AAG Cam Leonard assisted DNR in these discussions.

### Oil, Gas & Mining

During March, the Oil & Gas section assisted the Tax Division of the Department of Revenue in resolving 11 informal conference appeals from the 2002 oil and gas property tax assessments. Taxpayers have until late April to appeal the decisions to the State Assessment Review Board.

### Special Litigation

#### **BRIEFING COMPLETED ON CROSS MOTIONS IN AMHS-ARRC DISPUTE**

When the Alaska Marine Highway System was sued by one of its employees who slipped and fell on an icy dock, it turned to the owner of the dock, the Alaska Railroad Corporation, for reimbursement of the sums it paid to settle the claim by its employee. AMHS and ARRC have now completed briefing on cross motions for summary judgment addressing several complex legal issues, including: the availability of contract, implied warranty, and noncontractual indemnity; the viability of contribution; the cognizability of the case under state and federal admiralty law; and laches. AAG Bob Doehl is representing AMHS.

#### **LAWSUIT AGAINST OPA IS VOLUNTARILY DISMISSED**

In a complaint arising out of the death of an Office of Public Advocacy (OPA) ward from an automobile accident, the OPA guardian authorized the ward's family (by cultural adoption) to make medical decisions concerning the ward. OPA was then sued by the biological brother of the ward regarding authorization of medical decisions and transfer of property. The lawsuit was voluntarily dismissed based upon the law that the OPA guardian is vested with complete discretion to determine who is the appropriate person to make medical decisions on behalf of the ward, and that the duties a guardian owes to a ward do not extend to other parties. Defense of the lawsuit was handled by AAG Stephanie Galbraith.

#### **ANCHORAGE OFFICE BIDS FAREWELL TO BILL MORSE**

March was the last month of Bill Morse's tenure as an assistant attorney general in the Anchorage Special Litigation Section. Governor Knowles appointed AAG Morse to the superior court bench in Anchorage where he assumed his new duties commencing April 1, 2002. He will be greatly missed in our hallways and offices but will be a great addition to the bench in Alaska.

#### **TRAIN DEATH SUIT DISMISSED**

A wrongful death suit arising out of a collision at a railroad crossing concluded with judgment for the defense. The crossing for a logging road through a state forest was obtained by the Department of Natural Resources from Alaska Railroad Corporation, with a condition that DNR defend ARR for any litigation arising out of the crossing. Suit was brought by the estate of a logger who failed to stop at a stop sign at the crossing and was struck by a freight train. The Railroad, represented by AAG Randy Olsen, was able to demonstrate that the line of sight satisfied design specifications, and the train

was proceeding at the lawful speed for the section of track when it approached the crossing.

## Transportation

### SEWARD 8-18 LAND EXCHANGE

The Transportation Section completed a complicated exchange of land between Chugach Corporation, the Alaska Railroad, and DOT&PF made necessary by the Seward Highway improvement project just outside of Seward. The transaction was complicated by the fact that the Alaska Railroad has not yet received patent to its land from the federal government and by the fact that Alaska Railroad land swaps must be approved by the Alaska Legislature. Interim mutual land use permits are being used pending the Railroad's receipt of a patent to its lands.

### **STATE v. GLOBAL FINANCE COMPANY**

This is a new Fairbanks eminent domain case where DOT/PF is condemning a small part of a shopping mall and adjacent vacant lot for a highway improvement project. This month we obtained from the court an order confirming the state's authority and necessity for taking the property, and an order granting the state possession of the parcel condemned. The court denied the landowner's objection to the taking, which was based on allegations of bad faith of the state in the appraisal of the property and allocation of the deposit.

The principle landowners are two Washington corporations, wholly owned and controlled by one person. The condemned property is a partial acquisition of two adjacent lots, each owned in the name of a different corporation. The shopping mall is on one lot. The other lot is vacant, but is used for overflow parking in support of the mall. The landowners argued that the Department of Transportation acted in bad faith when it appraised the two properties

together despite the separate corporate ownership. The landowners also argued that the failure of the department to allocate the deposit between all of the named defendants (which included 19 lessees, 6 utilities and a taxing authority) was also done in bad faith. Judge Pengilly summarily rejected the landowners' arguments. The project is now proceeding.

## Criminal Division

### ANCHORAGE

A 16-year-old was waived into adult court for sexually abusing two 12 years old girls. His co-defendant, age 11, is being held at McLaughlin Youth Center. The older boy drove to the girl's house and snuck them out. He took the girls to his parent's house, where he and his co-defendant sexually assaulted both girls. The girls cried and kept saying "no", but the older boy covered one girl's mouth. The two girls escaped by running outside. One of the girl's mother discovered a note about the assault and notified authorities. The older boy is charged with sexual assault in the first degree and sexually abusing a minor in the first degree, four counts each. Bail was set at \$10,000.

Two defendants were charged with robbery in the first degree (two counts) and assault in the third degree (two counts) for a home invasion robbery. One, age 17, was waived into adult court. The two rang the doorbell at about 4:45 am. One victim answered the door and the two came in with ski masks and guns. The other victim asked to check on her one-year-old baby and called 911. The police arrived before they left the apartment. The older defendant was out on bail when he committed the robbery.

Antonio Roberson was charged with murder in the first and second degree for the stabbing death of another man. Roberson was found near the scene, covered with snow, without a jacket. A bloody jacket and other items were

found nearby abandoned. He initially denied any involvement in the murder, then claimed to be a witness. Finally, he told police that the victim picked him up from the bus terminal downtown. Roberson claims the victim kidnapped and sexually assaulted him, then drove to a Wal-Mart, where Roberson bought a knife and CD player. The victim then drove Roberson to a burger restaurant, where Roberson tried to steal the victim's car, and stabbed the victim in the heart. Bail was set at \$100,000.

### **BARROW**

A felony DWI defendant was convicted by a Barrow jury after a short deliberation. Another felony DWI defendant pled out, as did a defendant charged with burglary and another facing a trial for forgery.

The grand jury returned indictments against a Wainwright woman for criminal mischief for disabling a police vehicle, and against an Anaktuvuk woman for bootlegging.

There was a prompt response from other prosecutors to a request by ADA Mary Fischer for information on a defense psychological expert proposed on the eve of a sexual abuse of a minor trial. The defense expert, Dr. Raskin of Homer, has apparently been a favorite courtroom target of many of you. When Mary requested a pretrial deposition and possibly a Daubert hearing, the defense withdrew the expert. Special thanks to ADA Adrienne Bachman for sending pounds of impeachment material.

### **BETHEL**

Galen Kelly was found not guilty of sexual assault in the 2nd degree after a jury trial, but there's no shortage of new cases. Four people were indicted for bootlegging, three for felony DWI, and five for sexual offenses.

Andrea Powell's last day of work in the Bethel office was March 29th. She will be starting in the Anchorage office on April 1st.

### **FAIRBANKS**

With the upcoming retirement of perennial Chief Deputy Pat Doogan, ADA Scott Mattern has been appointed to assume those duties when Pat leaves at or near the end of April. Cathy Voigt, a long-time victim-witness paralegal, also announced her retirement as of April 30.

A jury in Delta Junction convicted Matthew Pease-Madore on 17 felony and 2 misdemeanor counts of sexually abusing seven boys over a six-month period, both in Delta and at a recreational area near Fairbanks. The defense was an odd mixture of the Salem Witch Trials and Stalin's Gulag (4 of the victims were from Russian immigrant families), but the jury was unpersuaded.

Would-be robbers did not do well in Fairbanks this month. A 17-year-old and a 32-year-old entered the Oasis Bar, fired a shot into the ceiling and ordered patrons to the floor, as one of them ran for the cash register. An off-duty employee and a patron disarmed one of them, and the other later was arrested and admitted his part in the robbery. The grand jury indicted for Robbery I and 5 counts of Assault III.

Lee Brown learned that it does not pay to drink and drive with faulty vehicle equipment. On March 26, a downtown bank was robbed by a man claiming to be armed with a revolver. On March 28, Brown was stopped for an equipment violation, then arrested for DWI. While being booked, a correctional officer noticed that Brown resembled the description on the bank robbery suspect. Suspicions were heightened when over \$5,000 was found on him, although Brown said he won the money playing pool. This explanation seemed less plausible when they noticed that the money included \$160 in marked bills and \$30 in \$2-dollar bills, the exact number the bank teller



reported in her till just before the robbery. The grand jury indicted for Robbery I, Theft II, and MICS IV, for a little cocaine he also had.

In one of his last sentencings before moving to the federal bench, Judge Beistline sentenced 20-year-old Joseph Thunderhawk to 31 years, with 12 suspended for a day-long series of sexual assaults on a casual acquaintance. About a year ago, Thunderhawk's father, Richard Cook, a minister in Ruby, was convicted of sexually abusing his daughter over several years. Evidence in connection with that trial showed that he had also sexually abused other daughters, and physically abused all members of the family. There was evidence that the male children had witnessed their father's abuse of the girls.

In unrelated cases, two men were charged with bizarre assaults on infants. In one case, a fugitive from Florida is charged with putting his fingers down the throat of a 7-week-old baby, tearing its esophagus. In the other, a man is charged with cramming a life-threatening quantity of toilet paper down the throat and nose of a 7-month-old child. Both defendants have suspicious child abuse and DV history in other states.

The City of Fairbanks repealed its domestic assault ordinance as of January 1, 2002. At the rate we are taking in those cases, the Fairbanks DAO will probably have an additional 350 new DV assault cases during this year.

## **JUNEAU**

The highlight of this month was ADA Doug Gardner playing his bagpipes on Good Morning America, followed shortly by his appearance in the audience on the David Letterman show.

A woman was indicted for sexually abusing two 13-year-old girls and a 13-year-old boy. Within 24 hours of being arraigned, she and another threatened and assaulted the person

who had reported the matter to the police. This has resulted in an additional B felony charge of Interfering with an Official Proceeding.

Charles A. High, Jr. was released from custody on discretionary parole in December, with a long record of violent conduct towards vulnerable family members and severe alcoholism. Last month he was charged with resisting arrest, possession of a sword, and being under the influence of intoxicants, all in violation of his parole. His probation officer told the judge that High should be released from custody so that probation could place him in a halfway house; the rationale being that his criminal conduct is now much less serious. Rationality prevailed, and he remains in custody.

## **KENAI**

There was a three-way tie for dumb defendant of the month in Kenai. One Kenai car thief ran from the vehicle when stopped by police. In an attempt to alter his appearance, he found a trash bag and made two holes for arms and one for his head and wore it over his clothes. His clever disguise did not fool Kenai's finest, however. The other car thief was found after tracking his footprints in the snow to his hiding place. When asked what he was doing, he said he was looking for his girlfriend. Amazing he couldn't find her at 10:00 p.m. in the winter in a trailer court crouching behind some tires. All that for a 10-year-old car that already had a broken window and a missing radio.

Rebecca Gunderson plead to Felony DWI, Felony Breath Test Refusal, and DWLR on the fourth morning of trial, and just prior to the state's rebuttal case. Gunderson had been charged when a U.S. Forest Service officer came upon a vehicle with a flat tire and the two occupants standing outside. Gunderson had first denied driving, but later admitted driving when her passenger, a man she had just met earlier that day, denied that he was the driver. At trial Gunderson took the stand to say that she was not driving at the time, and in fact, had

not even driven from her home in Anchorage to the site of the offense in Seward because she knew that her license was revoked and would therefore never drive. Instead she testified that her daughter had driven them to Seward earlier and then left with a friend. She testified that she had started drinking and visiting with friends by 2:00 p.m., approximately seven hours before the officer contacted her.

The next morning, as Gunderson and her attorney flew down from Anchorage for trial, they rode on the same plane as the defendant's daughter's friend, whom the state had tracked down after the previous day's testimony. They then realized that this person was going to testify that defendant's daughter couldn't have driven her to Seward earlier in the day, because she was at work in Anchorage until late in the afternoon. The defendant came into court, admitted to her lies in order to avoid perjury prosecution, and pled to all counts.

### **KETCHIKAN**

March did not have any jury trials. However, the grand jury was busy. Nine residents of Wrangell were charged with numerous misconduct involving controlled substances in the 3rd or 4th degree for selling cocaine, psilocybin, and marijuana to an undercover informant working for the Wrangell police for about a year.

Two Ketchikan residents were charged with possession of child pornography and one of them was charged with distribution of child pornography. One of them downloaded some child pornographic pictures from his CD-ROM onto a computer at his place of work at the public utility power plant. An employee saw him do so and reported this. The police seized that computer as well as a laptop used by another employee who had also brought child pornography to work. Four other defendants were indicted for misconduct involving controlled substances in the 4th degree for

possession of methamphetamine or cocaine. Others were indicted for vehicle theft, assault in the 3rd degree, sexual abuse of minor, and sexual assault in the 2nd degree.

### **KODIAK**

A Kodiak man was sentenced to 2 years incarceration and ordered to pay a fine of \$5,000 following his conviction for felony DWI with blood-alcohol level of .257%.

Another Kodiak man was indicted for assault in the third degree for hitting another man over the head with a beer bottle in an altercation at a local bar. A man turned an otherwise uneventful traffic stop into a class C felony when he decided to dump his pack of cigarettes in the back of a trooper's patrol vehicle. Because it was raining, the trooper had asked this man to sit in the back of his patrol vehicle while he was writing a citation. The man, evidently fearing he was going to be arrested, decided to hide his cigarette pack under the front seat of the trooper's car. When the trooper subsequently searched his vehicle (as is his uniform protocol after having someone in the back seat) he discovered the man's cigarette pack along with the cocaine it contained. This defendant was subsequently indicted by the grand jury for misconduct involving a controlled substance in the fourth degree.

### **KOTZEBUE**

Sexual abuse and sexual assault cases dominated the incoming cases in Kotzebue. A 19-year-old resident of Selawik was arrested and charged with the sexual abuse of a two-year-old female. He is alleged to have sexually assaulted the girl while she was bathing. The child was injured and had to be flown to Anchorage for surgery. The defendant was indicted for sexual abuse of a minor in the first degree and sexual assault in the first degree. A 25-year-old Point Hope man was indicted on sexual abuse of a minor and burglary charges after he entered a home in the village and

attempted to have sex with a sleeping 10-year-old child. A 14-year-old female reported to the troopers that she had been sexually assaulted by several older males since she was five or six years old. Her disclosures resulted in the arrest of the Selawik men, ages 51, 24, and 21. Other new felony cases include a bootlegging case and a felony DWI.

## **NOME**

Once again the Iditarod festivities came and went in Nome without a major impact on the Nome DAO. The influx of visitors from out-of-town for the end of the dog race and for a large weeklong basketball tournament does bring an increase in the alcohol-related disorderly-type offenses, but generally an aura of good will prevails. That is not to say that there was no new activity—a man was arrested, and subsequently indicted, for a sexual assault occurring in Nome, and a trooper was injured in assisting the Nome police in attempting to arrest him. Another man was arrested in Gambell on a felony assault charge after he had attempted to stab a village police officer. The VPO had simply been trying to get the man out of a residence where he had been creating a disturbance. ADA John Earthman has been litigating a suppression motion in which two juvenile defendants from Stebbins are seeking suppression of their admissions to sexually abusing a five-year-old boy in that village. In another case out of Stebbins, a man was indicted for a burglary of the village store, and he is the suspect in several other burglaries in Stebbins. Two unrelated assault cases from Gambell were initially charged as felonies because the victims were reported to each have a broken arm. The cases were resolved as misdemeanors after it was determined that neither victim, in fact, had any broken bones.

## **PALMER**

A jury found Fred Esguerra guilty of two counts of Sexual Abuse of a Minor in the First Degree and one count of Attempted Sexual

Abuse of a Minor in the First Degree. Sentencing is set for May. Before the trial, Esquerra served a year and a half in prison resulting from a Misconduct Involving Controlled Substances in the Fourth Degree (methamphetamine) conviction in 2001.

Nine individuals were indicted on drug charges. Eight were involved in growing marijuana, and one was manufacturing methamphetamine. The grand jury also handed down an indictment charging Assault in the Third Degree on a Valdez man.

## **SITKA**

In trial, a man was convicted of violating conditions of release, resisting arrest and criminal mischief. Another man was convicted of DWI, his fifth such conviction, and of two misdemeanor weapons offenses. He claimed a necessity defense at trial, arguing he was avoiding the greater harm of hypothermia by driving his boat back to town rather than freezing outside after he drove over to a local bunkhouse to visit a friend who wasn't home, drank six beers and a pint of hard liquor while waiting, and then got cold when his friend didn't arrive.

Of note in court, a man pled guilty to perjury for lying to the parole board about getting drugs while in a treatment program. The case was initiated after the parole board didn't believe his story that he got pain killers from the emergency room and asked the adult probation officer to investigate. He will serve the flat presumptive six-year sentence for a third-time felon.

## **OSPA**

(Office of Special Prosecutions & Appeals)

## **Personnel News**

**Jim Hanley concluded his four-month tour with OSPA.** Jim, a 25-year veteran of the

criminal division, came out of retirement to work for OSPA after Eric Johnson went to work for the New York attorney general's office. Thanks for all your hard work, Jim!

**Ken Diemer joined OSPA to fill the position created by Jim's departure.** Ken has worked for the last five years in the criminal research division of the Ninth Circuit Court of Appeals' staff attorney's office, the last two as the supervising attorney for that division. He returns to Alaska after working in private practice in Anchorage and clerked for U.S. Magistrate Judge Branson.

### Prosecution News

**Thomas Rickard entered a plea of no contest to falsifying business records.** Rickard had been working as the manager of Hap Enterprises, a construction firm, from 1994 through 1998. During that time, he and the bookkeeper falsified entries in the account ledgers to make it appear that vendors were being paid, when the checks were actually being written to Rickard. An estimated \$200,000 was stolen in this manner. Sentencing is set for August.

**Martha Hale was found to be in violation of her probation for welfare fraud.** She was originally convicted for failing to report all of her income. Judge Wolverton revoked Hale's remaining suspended time and imposed one year in jail.

**Peter Petla, Jr. pled to violating landing requirements.** Petla possessed fish on board while he was over one-and-a-half miles outside of the fishing district. He was fined \$8,000 with \$3,000 suspended and the court forfeited over 3,000 pounds of salmon.

**Einar Langesater pled to one count of commercial fishing during a closed period.** Langesater set his net prior to the opening for commercial salmon fishing. He was fined \$15,000 with \$7,500 suspended and ordered to forfeit his catch.

## Petitions & Briefs of Interest

### Petitions of Interest

**Merger of offenses.** Judge Curda ordered the pretrial merger of a first-degree sexual assault charge (nonconsensual sexual intercourse) and second-degree sexual assault charge (nonconsensual sexual contact with victim's breasts); the latter charge was not a lesser included offense of the first. In a petition for review to the Alaska Court of Appeals, the state argues that Judge Curda's ruling represents an extreme departure from the usual procedure of determining after trial (but before sentencing) whether merger is necessary, interferes with the state's charging discretion, creates jury unanimity problems, and prejudices the state's ability to effectively prosecute defendants for multiple sex crimes. *State v. Kameroff*, A-8286.

**Invocation of right to counsel and Malkin.** Judge Wolverton suppressed a murder suspect's statements after the suspect asked during a police interview, "How long would it take for a lawyer to get here, so I can speak to a lawyer?" In a petition for review to the Alaska Court of Appeals, the state argues that the question was not an unequivocal invocation of his right to counsel and that the police acted properly in attempting to clarify whether the suspect was actually asking for a lawyer. Judge Wolverton also suppressed other statements of the suspect obtained under a Glass warrant after concluding that the police recklessly failed to inform the magistrate of information relating to an informant's credibility – specifically, information regarding the informant's alleged involvement in other crimes. In the same petition for review, the state argues that the police did not withhold information because they had no evidence actually linking the informant to the crimes other than the suspect's self-serving statements, and that the magistrate had, in any event, presumed the informant was a criminal informant. *State v. Anderson*, No. A-8257.

**Accomplice liability – Echols revisited.** The state argues that *Echols v. State* was wrongly decided when it held that an accomplice must specifically intend the results of a reckless or criminally negligent crime. The state first argues that it was not plain error to fail to instruct the jury on the specific intent requirement for accomplice liability for a reckless crime. Then the state shows that the court of appeals erred on all three prongs of its *Echols*’ holding – the plain language of AS 11.16.110, the legislative history of AS 11.16.110, and the support of legal commentators for the court’s position. *Riley v. State*, No. A-8092.

**Position of authority – sexual abuse of a minor.** The state argues that the court of appeals correctly construed the phrase “position of authority” in AS 11.41.438(a)(2) as requiring the jury to decide whether the defendant occupied a position of authority over the victim. The defendant in this case had been the mother’s live-in boyfriend for a number of years and had exercised parental authority over the victim. *Wurthmann v. State*, S-10219.

**Expert testimony concerning the effect of police questioning techniques on the reliability of confessions.** The state argues that the trial judge correctly applied the Coon factors for scientific evidence to exclude a psychologist’s proposed expert testimony on how police questioning affects the reliability of confessions. The state asserts that the testimony was deficient in that the psychologist’s theories had not been empirically tested, did not have a verifiable error rate, and had not gained general acceptance. The state also argues that the testimony would not have been helpful to the jury because jurors can make their own evaluation on whether a confession has been coerced. *Vent v. State*, A-7647.

### Statute and Rule Interpretations

**Credit for time served (Nygren credit).** AS 12.55.025(c) allows a judge to order credit for time served for time spent in a residential treatment facility. The court of appeals held that AS 12.55.025(c) applies even where the defendant can leave the treatment facility for 10 to 11 hours a day to work in the community. *State v. Fortuny*, Op. 1792 (Alaska App., March 8, 2002).